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APPELLATE COURT

12611 FEY v. BOBRINK. Industrial Board. *Reversed.* Nichols, C. J. May 14, 1926.

Under the workman's compensation act where an employee is killed by a fellow-employee because of a quarrel over orders which the employee had a right to issue in the course of his employment, then the death is in the course of the employment and liabilty follows.

12134 FOX v. WALLACE, *et al.* Marion County. *Reversed.* Remy, J. May 19, 1926.

Where there is an action filed for specific performance of a contract involving real estate and the court refuses to grant the petition but awards damages for breach of contract this is error. It is not a case of a court's taking jurisdiction in equity and then rendering full recovery to the parties because there never was any occasion for equitable relief in this case, to begin with, since the action for performance was groundless.

12144 GRAHAM, ADMINISTRATRIX v. PLOTNER. Miami County. *Affirmed.* Nichols, C. J. May 13, 1926

Whe.re an aged man has given money to his niece and her husband and then gives them more money in consideration of their caring for him and expresses great satisfaction of the care they give, there is sufficient evidence to show that the later gift was not in lieu of the first.

12352 HOOSIER CONDENSED MILK CO. v. AMERICAN RAILWAY EXPRESS CO. Wells County. *Affirmed.* May 12, 1926.

Per curiam.

12444 NATIONAL FIRE INSURANCE CO. v. CROOKER. Newton County. *Affirmed.* Nichols, C. J. May 19, 1926.

Where an insurance company denies liability for loss within the allotted period for the insured to prove his loss, the proof of loss is waived and the insured's rights are not affected by a failure to submit proof of loss.

12401 RADCLIFF, *et al.* v. EDWARDS. Lawrence County. *Affirmed.* Nichols, C. J. May 13, 1926.

Where parties own adjoining land which has been surveyed and they later fix the boundary by metes and bounds themselves, this later boundry will prevail although it is contrary to the plats and deeds of the original transaction.

12361 RAGI v. H. G. CHRISTIAN CO. St. Joseph County. *Reversed.* Dausman, J. McMahan concurs in results. May 19, 1926.

The finding of the Industrial Board is not the decision of a court and when it is filed in a circuit court, such finding is purely for purposes of securing a writ of execution. It appeared in the instant case that the Industrial Board found against the claimant on the ground that the employment was illegal; hence the claimant had a right of action for negligence in the regular courts .

12383 REXFORD, *et al.* v. BOARD OF COMMISSIONERS. RushCounty. *Affirmed.* Nichols, C. J. May 19, 1926.

The liability of a county for a bridge built by a private contractor will depend upon whether there was compliance with the statute under which the Board of Commissioners is authorized to let private contracts.

12343 SIMON v. SHAFFER. Johnson County. *Reversed.* Thompson, J. May 20, 1926.

Where appellee was a farm hand and allowed to cut wood for his fuel, there was no liability in appellant, his employer, because appellee was injured in cutting the limbs from a log on the edge of a stream. The possibility of the logs turning was a risk which appellee assumed.

12206 SOUTHERN INDIANA GAS AND ELECTRIC CO. v. VAHGHN. Posey County. *Affirmed.* McMahan, J.

The errors alleged were that the trial court failed to give certain instructions. The Appellate Court held that the content of these instructions was sufficiently covered by the other instructions.

12195 SOUTHERN INDIANA GAS AND ELECTRIC CO. v. HARRISON. Affirmed. McMahan, J. May 12, 1926.

Where a chauffeur saw appellant walking around a pile of sand in the street and ran into her because she did not move on hearing his bell, there was sufficient evidence to hold the chauffeur liable under the last chance rule regardless of any alleged contributory negligence in the appellant.

12462 STRAUSS, *et al.* v. CONNER. Wabash County. *Affirmed.* Nichols, C. J. May 14, 19266.

Per curiam.

12489 TENEYCKE, *et al.* v. LESH, *et al.* Marion County. *Affirmed.* Nichols, C. J. May 13, 1926.

Where one buys land at a partition sale, he takes free of prior equity even though he claimed the land before the sale and there are equitable defenses to his title.

12233 TRIBUNE COMPANY v. RED BALL TRANSIT CO., *et al.* Appellant's petition for rehearing is denied. Nichols, C. J. May 21, 1926.

Where a contract is ambiguous, it is proper for the court to admit oral evidence to explain the ambiguities in the proper cases.

12303 WARNER SUGAR REFINING CO. v. BEYER BROTHERS, Goshen. Elkhart County. *Asirmed.* McMahan, J.

Where oral testimony is necessary to identify letters that in turn are requisite to take a contract of sale out of the statute of frauds, the statute of frauds applies and the later letters are not admissible in evidence.

12349 WISCONSIN LUMBER AND COAL CO. v. *Wall, et al.* Lake County. Appeal dismissed. Thompson, J. May 19, 1926.

Where the record of the lower court does not show a final disposition of a cross-complaint, this cross-complaint is still pending and the case in the lower court is not so far completed that an appeal can be taken.

SUPREME COURT

25033 CLODFELDER v. STATE. Knox County. *Affirmed.* Ewbank, C J. Willoughby, J. Not participating. May 20, 1926

Where by a fictitious holdup the defendant obained promissory notes held against him by another, the evidence supported a conviction for robbery of stated property and grand larcency.

24755 COSILITO v. STATE. Elkhart County. *Affirmed.* Ewbank, C. J. May 21, 1926.

There is no duplicity in the proceedings where the appellant was charged with keeping a resort for liquor and selling liquor therein.

25001 DENNISON, *et al.* v. STATE. Dearborn County. *Affirmed.* Willoughby, J. May 18 1926.

Where the state presented evidence that appelants had rented a cellar to operate a still and had actually paid rent in proportion to, the amount of whiskey made an dsold, this was sufficient evidence to sustain the conviction of illegally possessing a still.

24660 DONCASTER v. STATE. Marion County. *Reversed.* Travis, J. May 13, 1926.

Where a sheriff arrested appellant for the violating of the speed laws and then by questioning him on matters not connected with the arrest, learned that re had liquor in the car, there was no ground for searching the car and evidence obtained by such search without a warrant was inadmissable on the trial for violation of the prohibition law.

24555 GROENDYKE v. STATE. Starke County. *Reversed. Travis, J.* May 19, 1926.

In an indictment for failure to support a minor child it is necessary to allege that the child lives within the state under the Indiana statute.

25055 HENRY, *et al.* v. STATE *ex rel* THUERNER, *et al.* Dearborn County. Appellant's petition etc. is denied. *Per curiam.* May 18, 1926.

Where the court holds that the appeal is not prosecuted in good faith, it will not exercise its discretionary power to prevent the withdrawal of the transcript in order to perfect a vacation appeal.

24526 LAND v. STATE. Delaware County. *Affirmed.* Travis J. May 20, 1926.

Decision affirmed because appellant's brief failed to set out the instructions complaned of or present other matters which the supreme court could review.

24447 LUGAR v. BURNS. Benton County. Appellant's petition for rehearing denied. Ewbank, C. U. May 14, 1926.

Where appellant no longer held the office involved in the litigation, it would have been proper to have urged befor the court that it was merely a moot question but an appellate court cannot consider such a matter which was not presented to a trial court.

25012 MAYER *v.* STATE. Elkhart County. *Reversed.* Ewbank, C. J. May 12, 1926

Where appellant with an intent to defend his w,ife from unlawful assault, struck a deputy sheriff, there is insufficient evidence to convict him of assault with intent to commit murder.

24421 MESMER v. ENGLAND. Clark County. *Affirmed...Myers, J.* May 20, 1926.

Where a child, nine years old, lives with its greatgrandmother and a petition for its custody is denied by the trial court when filed by the mother who can also provide a good home for the child, the upper court will not reverse the case unless the evidence is very clear that the child's welfare would be better served by giving custody to the mother.

25042 MOORE v. STATE. Delaware County. *Reversed.* Gemmill, J. May 13, 1926.

Where an instruction in a criminal case says that the state must prove one or more of its material allegations, this is error since all the material allegations must be proven.

24889 SHOCK V. STATE. Allen County. *Affirmed.* Ewbank, C. J. May 19, 1926.

The fact that a criminal offense was charged to have occurred on an erroneous date will not make the indictment bad after conviction where the trial and all the evidence proceeded on the basis of the correct date, as later urged by the appellant himself.

24856 SUNDERMAN V. STATE. Huntington County. *Affirmed.* Willoughby J. May 21, 1926.

As against a motion to quash it is not necessary for the state to set forth the content of a publication which it alleges is in violatoin of Section 2569 Burns 1926 because of its licentious character.

28024 WILKINSON V. STATE Delaware County. *Affirmed.* Willoughby, J. May 13, 1926.

Held that a woman is not ineligible to jury services solely because of her sex.

24966 WOLF V. STATE. Delaware County. *Affirmed.* Ewbank, C. J. May 13, 1926.

Where an instruction is given that is favorable to appellant, there is no error if that instruction was improperly given.